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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	Criminal Case No. 08-CR-0712-L
)	
11 Plaintiff,)	DATE: June 30, 2008
)	TIME: 2:00 p.m.
12 v.)	
)	
13 CARLOS LOPEZ-GARCIA,)	UNITED STATES' RESPONSE AND
)	OPPOSITION TO DEFENDANT'S
14 Defendant.)	MOTION TO COMPEL DISCOVERY
)	
15 _____)	

16 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
17 Karen P. Hewitt, United States Attorney, and David D. Leshner, Assistant United States Attorney,
18 and hereby files its response and opposition to defendant Carlos Lopez Garcia's Motion to Compel
19 Discovery in the above-referenced case. Said response and opposition is based upon the files and
20 records of this case together with the attached memorandum of points and authorities.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**

3 **STATEMENT OF THE CASE**

4 On March 12, 2008, defendant Carlos Lopez-Garcia was arraigned on a one-count indictment
5 charging him with a violation of Title 8, United States Code, Sections 1326(a) and (b). Defendant
6 entered a plea of not guilty.

7 **II**

8 **STATEMENT OF FACTS**

9 **A. Defendant's Apprehension**

10 On February 13, 2008, Border Patrol Agent J. Saracco observed Defendant walking on
11 Highway 86 near Westmorland, California. Agent Saracco pulled over in his vehicle and engaged in
12 a consensual conversation with Defendant on the side of the road. During that conversation,
13 Defendant stated that he was a citizen of Mexico and that he had no documents allowing him to
14 lawfully enter or remain in the United States. Defendant further represented that he had entered the
15 United States illegally on foot near the Tecate, CA Port of Entry in January 2008. Based on this
16 information, Agent Saracco arrested Defendant and transported him to the Border Patrol Highway
17 86 Checkpoint for processing.

18 Defendant received Miranda warnings and agreed to make a statement. According to
19 Defendant, he is a Mexican citizen with no entitlement be in the United States. Defendant further
20 admitted that he previously had been ordered deported by an Immigration Judge and that he had
21 returned to the United States to find work.

22 **B. Defendant's Immigration History**

23 Defendant is a citizen of Mexico. On April 16, 1993, he was removed from the United States
24 to Mexico pursuant to an Order of an Immigration Judge. Defendant also was removed from the
25 United States to Mexico on January 8, 1998.

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1 **C. Defendant's Criminal History**

2 On or about November 13, 1995, Defendant was convicted in Orange County Superior Court
3 of First Degree Robbery, Second Degree Robbery and Assault with a Deadly Weapon, in violation
4 of Penal Code §§ 211 and 245(a)(1). Defendant was sentenced to a total term of 5 years
5 imprisonment.

6 **III**

7 **DEFENDANT'S MOTION TO COMPEL DISCOVERY**

8 To date, the Government has provided Defendant with 49 pages of discovery and one
9 DVD, including reports of his arrest, his rap sheet, and copies of his immigration and conviction
10 documents. The Government also has provided Defendant with the audio recording of his April 15,
11 1993 deportation hearing before an Immigration Judge.

12 In an attempt at simplification, this memorandum will address two specific areas of
13 discovery: (1) items which the Government either has provided or will voluntarily provide; and (2)
14 items demanded and discussed by Defendant which go beyond the strictures of Rule 16 and are not
15 discoverable.

16 **1. Items which the Government has provided or will voluntarily provide.**

17 a. The Government will disclose to Defendant and make available for
18 inspection, copying or photographing: any relevant written or recorded statements made by
19 Defendant, or copies thereof, within the possession, custody, or control of the Government, the
20 existence of which is known, or by the exercise of due diligence may become known, to the attorney
21 for the Government; and that portion of any written record containing the substance of any relevant
22 oral statement made by Defendant whether before or after arrest in response to interrogation by any
23 person then known to Defendant to be a Government agent. The Government also will disclose to
24 Defendant the substance of any other relevant oral statement made by Defendant whether before or
25 after arrest in response to interrogation by any person then known by Defendant to be a Government
26 agent if the Government intends to use that statement at trial.

27 b. The Government will permit Defendant to inspect and copy or photograph
28 books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions

thereof, which are within the possession, custody or control of the Government, and which are material to the preparation of Defendant's defense or are intended for use by the Government as evidence during its case-in-chief at trial, or were obtained from or belong to Defendant;¹

c. The Government will permit Defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are in the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Government, and which are material to the preparation of his defense or are intended for use by the Government as evidence during its case-in-chief at trial;²

d. The Government has furnished to Defendant a copy of his prior criminal record, which is within its possession, custody or control, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the Government;

e. The Government will disclose the terms of all agreements (or any other inducements) with cooperating witnesses, if any are entered into;

f. The Government may disclose the statements of witnesses to be called in its case-in-chief when its trial memorandum is filed;³

g. The Government will disclose any record of prior criminal convictions that could be used to impeach a Government witness prior to any such witness' testimony;

¹ Rule 16(a)(1)(C) authorizes defendants to examine only those Government documents material to the preparation of their defense against the Government's case-in-chief. United States v. Armstrong, 517 U.S. 456, 463 (1996). Rule 16 does not require the disclosure by the prosecution of evidence it intends to use in rebuttal. United States v. Givens, 767 F.2d 574, 583 (9th Cir. 1984).

² The Government need not "disclose every single piece of paper that is generated internally in conjunction with scientific tests." United States v. Iglesias, 881 F.2d 1519, 1524 (9th Cir. 1989).

³ Production of these statements is governed by the Jencks Act and need occur only after the witness testifies on direct examination. United States v. Mills, 641 F.2d 785, 789-790 (9th Cir. 1981); United States v. Dreitzler, 577 F.2d 539, 553 (9th Cir. 1978). For Jencks Act purposes, the Government has no obligation to provide the defense with statements in the possession of a state agency. United States v. Durham, 941 F.2d 858, 861 (9th Cir. 1991). Prior trial testimony does not fall within the scope of the Jencks Act. United States v. Isigro, 974 F.2d 1091, 1095 (9th Cir. 1992). Further, an agent's recorded radio transmissions made during surveillance are not discoverable under the Jencks Act. United States v. Bobadilla-Lopez, 954 F.2d 519, 522-23 (9th Cir. 1992). The Government will provide the grand jury transcripts of witnesses who have testified before the grand jury if said testimony relates to the subject matter of their trial testimony. Finally, the Government reserves the right to withhold the statement of any particular witness it deems necessary until after the witness testifies.

1 h. The Government will disclose in advance of trial the general nature of other
2 crimes, wrongs, or acts of Defendant that it intends to introduce at trial pursuant to Rule 404(b) of
3 the Federal Rules of Evidence;

4 i. The Government acknowledges and recognizes its continuing obligation to
5 disclose exculpatory evidence and discovery as required by Brady v. Maryland, 373 U.S. 83 (1963),
6 Giglio v. United States, 405 U.S. 150 (1972), the Jencks Act and Rules 12 and 16 of the Federal
7 Rules of Criminal Procedure, and will abide by their dictates.⁴

8 **2. Items which go beyond the strictures of Rule 16**

9 **a. Defendant's requests for specific Brady information or general Rule 16**
10 **discovery.**

11 Defendant requests that the Government disclose all evidence favorable to him or which
12 "affects the credibility of the Government's case." (Motion at 3.)

13 It is well-settled that prior to trial, the Government must provide a defendant in a criminal
14 case with evidence that is both favorable to the accused and material to guilt or punishment.
15 Pennsylvania v. Richie, 480 U.S. 39, 57 (1987); United States v. Agurs, 427 U.S. 97 (1976); Brady
16 v. Maryland, 373 U.S. 83, 87 (1963). As the Supreme Court has explained, "a fair analysis of the
17 holding in Brady indicates that implicit in the requirement of materiality is a concern that the
18 suppressed evidence may have affected the outcome of the trial." Agurs, 427 U.S. at 104.
19 "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed
20 to the defense, the result of the proceeding would have been different." United States v. Bagley, 473
21 U.S. 667, 682 (1985) (emphasis added). A "reasonable probability" is a probability sufficient to
22 undermine confidence in the outcome. Richie, 480 U.S. at 57 (citation omitted).

23 The Supreme Court has repeatedly held that the Brady rule is not a rule of discovery; rather,
24 it is a rule of fairness and is based upon the requirement of due process. Bagley, 473 U.S. at 675, n.

25
26 ⁴ Brady requires the Government to produce all evidence that is material to either guilt or
27 punishment. The Government's failure to provide the information required by Brady is constitutional
28 error only if the information is material, that is, only if there is a reasonable probability that the result
of the proceeding would have been different had the information been disclosed. Kyles v. Whitley, 514
U.S. 419 (1995). However, neither Brady nor Rule 16 require the Government to disclose inculpatory
information to the defense. United States v. Arias-Villanueva, 998 F.2d 1491 (9th Cir. 1993).

6. The Supreme Court's analysis of the limited scope and purpose of the Brady rule, as set forth in the Bagley opinion, is worth quoting at length:

Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. [footnote omitted]. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial: "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose . . . but to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."

Id. at 675 (emphasis added, citation omitted). Accordingly, the Government in this case will comply with the Brady mandate but rejects any affirmative duty to create or seek out evidence for the defense.

b. Disclosure of witness information

Defendant seeks numerous records and information pertaining to potential Government witnesses. Regarding these individuals, the Government will provide Defendant with the following items prior to any such individual's trial testimony:

- (1) The terms of all agreements (or any other inducements) it has made with cooperating witnesses, if they are entered into;
- (2) All relevant exculpatory evidence concerning the credibility or bias of Government witnesses as mandated by law; and,
- (3) Any record of prior criminal convictions that could be used to impeach a Government witness.

The Government opposes disclosure of rap sheet information of any Government witness prior to trial. See United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). Furthermore, any uncharged prior misconduct attributable to Government witnesses, all promises made to and consideration given to witnesses by the Government, and all threats of prosecution made to witnesses by the Government will be disclosed if required by Brady and Giglio.

c. Agents' rough notes

Although the Government has no objection to the preservation of agents' handwritten notes,

the Government objects to their production at this time. If during any evidentiary proceeding, certain rough notes become relevant, these notes will be made available.

Prior production of these notes is not necessary because they are not “statements” within the meaning of the Jencks Act unless they comprise both a substantially verbatim narrative of a witness’ assertions and they have been approved or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980); United States v. Kaiser, 660 F.2d 724, 731-32 (9th Cir. 1981); United States v. Griffin, 659 F.2d 932, 936-38 (9th Cir. 1981).

d. Government reports, summaries and memoranda

Rule 16 provides, in relevant part:

[T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agent in connection with the investigating or prosecuting of the case.

Rule 16(a)(2). This subsection exempts from disclosure documents prepared by government attorneys and agents that would otherwise be discoverable under Rule 16. United States v. Fort, 472 F.3d 1106, 1110 & n.2 (9th Cir. 2007).

As expressed previously, the Government recognizes its obligations pursuant to Brady, Giglio, Rule 16, and the Jencks Act.⁵ But the Government shall not turn over internal memoranda or reports which are properly regarded as work product exempted from pretrial disclosure.⁶ Such disclosure is supported neither by the Rules of Evidence nor case law and could compromise other areas of investigation still being pursued.

e. Addresses and phone numbers of Government witnesses

Defendant requests the name and last known address and phone of each prospective Government witness. While the Government may supply a tentative witness list with its trial memorandum, it objects to providing home addresses and telephone numbers. See United States v. Sukumolachan, 610 F.2d 685, 688 (9th Cir. 1980); United States v. Conder, 423 F.2d 904, 910 (9th

⁵ Summaries of witness interviews conducted by Government agents are not Jencks Act statements. United States v. Claiborne, 765 F.2d 784, 801 (9th Cir. 1985).

⁶ The Government recognizes that the possibility remains that some of these documents may become discoverable during the course of the trial if they are material to any issue that is raised.

1 Cir. 1970) (addressing defendant's request for the addresses of actual Government witnesses).

2 **f. Personnel files of federal agents**

3 Pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and United States v.
 4 Cadet, 727 F.2d 1453 (9th Cir. 1984), the Government agrees to review the personnel files of its
 5 federal law enforcement witnesses and to “disclose information favorable to the defense that meets
 6 the appropriate standard of materiality” Cadet, 727 F.2d at 1467-68. Further, if counsel for the
 7 United States is uncertain about the materiality of the information within its possession, the material
 8 will be submitted to the court for in-camera inspection and review. In this case, the Government
 9 will ask the affected law enforcement agency to conduct the reviews and report their findings to the
 10 prosecutor assigned to the case.

11 In United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992), the Ninth Circuit held that the
 12 Assistant U.S. Attorney assigned to the prosecution of the case has no duty to personally review the
 13 personnel files of federal law enforcement witnesses. In Jennings, the Ninth Circuit found that the
 14 present Department of Justice procedures providing for a review of federal law enforcement witness
 15 personnel files by the agency maintaining them is sufficient compliance with Henthorn. Id. In this
 16 case, the Government will comply with the procedures as set forth in Jennings.

17 Finally, the Government has no duty to examine the personnel files of state and local officers
 18 because they are not within the possession, custody or control of the Federal Government. United
 19 States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

20 **g. Reports of witness interviews**

21 To date, the Government does not have any reports regarding witness interviews or otherwise
 22 that have not been turned over to Defendant. However, to the extent that such additional reports
 23 regarding witness interviews are generated, the information sought by Defendant is not subject to
 24 discovery under the Jencks Act, 18 U.S.C. § 3500.

25 Reports generated in connection with a witness’s interview session are only subject to
 26 production under the Jencks Act if the witness signed the report or otherwise adopted or approved
 27 the contents of the report. See 18 U.S.C. § 3500(e)(1); United States v. Miller, 771 F.2d 1219, 1231-
 28 31 (9th Cir. 1985) (“The Jencks Act is, by its terms, applicable only to writings which are signed or

adopted by a witness and to accounts which are substantially verbatim recitals of a witness' oral statements."); United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979) (interview report containing a summary of a witness' statements is not subject to discovery under the Jencks Act); United States v. Augenblick, 393 U.S. 248, 354 (1969) (rough notes of witness interview not a "statement" covering entire interview). Indeed, "both the history of the [Jencks Act] and the decisions interpreting it have stressed that for production to be required, the material should not only reflect the witness' own words, but should also be in the nature of a complete recital that eliminates the possibility of portions being selected out of context." United States v. Bobadilla-Lopez, 954 F.2d 519, 522 (9th Cir. 1992).

h. Expert witnesses

The Government will disclose to Defendant the name, qualifications, and a written summary of testimony of any expert the Government intends to use during its case-in-chief at trial pursuant to Fed. R. Evid. 702, 703, or 705 three weeks prior to the scheduled trial date.

i. Other discovery requests

To the extent that the above does not answer all of Defendant's discovery requests, the Government opposes the motion on the grounds that there is no authority requiring the production of such material.

IV

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny defendant's motion to compel discovery.

DATED: June 16, 2008.

Respectfully submitted,

Karen P. Hewitt
United States Attorney

s/ David D. Leshner
DAVID D. LESHNER
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 08-CR-0712-L
)	
Plaintiff,)	
)	
v.)	
)	CERTIFICATE OF SERVICE
CARLOS LOPEZ-GARCIA,)	
)	
Defendant.)	

IT IS HEREBY CERTIFIED THAT:

I, DAVID D. LESHNER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCOVERY** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Paul Turner, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 2008.

/s/ David D. Leshner

DAVID D. LESHNER